92-1249

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

AFRICAN-AMERICAN VOTING RIGHTS
LEGAL DEFENSE FUND, INC., et al.,
Appellants,
v.
ROY D. BLUNT, et al.,
Appellees

On Appeal from the United States
District Court, Western District
of Missouri

MOTION OF APPELLEES ROY D. BLUNT AND JOHN ASHCROFT TO DISMISS

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December 1, 1992

QUESTIONS PRESENTED

I.

IS A NOTICE OF APPEAL FROM A FINAL DECISION OF A THREE-JUDGE DISTRICT COURT, FILED MORE THAN THIRTY DAYS AFTER THE ENTRY OF JUDGMENT, SUFFICIENT TO INVOKE THE JURISDICTION OF THIS COURT?

II.

UNDER RULE 39 OF THE SUPREME COURT RULES, DOES AN APPELLANT PROCEED PROPERLY *IN FORMA PAUPERIS* AND IN VIOLATION OF THE PRINTING PROVISIONS OF RULE 33, IF NOTARIZED AFFIDAVITS OF PARTY APPELLANTS ARE NOT PRESENTED IN SUPPORT OF SAID MOTION, AND THERE IS NO SHOWING THAT THE INDIVIDUAL APPELLANTS ARE WITHOUT THE FUNDS SUFFICIENT TO COMPLY WITH RULE 33?

III.

HAS AN APPELLANT COMPLIED WITH RULE 18.3 OF THE SUPREME COURT RULES, SO AS TO PROPERLY INVOKE THE JURISDICTION OF THIS COURT, BY FILING A JURISDICTIONAL STATEMENT WHICH DOES NOT INCLUDE A REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF LOWER COURT OPINIONS, AN INDEPENDENT SECTION ON THE CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE, AND AN ARGUMENT AMPLIFYING THE REASONS RELIED UPON BY APPELLANT TO INVOKE JURISDICTION?

PARTIES TO PROCEEDINGS BELOW

All of the parties to the proceedings in the United States District Court, Western District of Missouri, are named in the caption to appellants' jurisdictional statement.

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On Appeal from the United States District Court, Western District of Missouri

MOTION TO DISMISS

Pursuant to Rule 18.6, the appellees, Roy D. Blunt, Missouri Secretary of State, and John Ashcroft, Missouri Governor, move to dismiss the appeal filed on behalf of the appellants, because the appeal is not within this Court's jurisdiction and because the appeal has not been taken in conformity with the Rules of this Court.

STATUTORY PROVISIONS AND SUPREME COURT RULES INVOLVED

In pertinent part, 28 U.S.C. § 21.01(b), provides that "[a]ny other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit, or proceeding, shall be taken within thirty days from the judgment, order, or decree appealed from, if interlocutory, and within sixty days if final."

In pertinent part, Supreme Court Rule 18.1 provides that "[a] direct appeal from a decision of a United States district court, when authorized by law, is commenced by filing a notice of appeal with the clerk of the district court within 30 days after the entry of the judgment sought to be reviewed. The time may not be extended."

Supreme Court Rule 18.3 provides as follows:

> Not more than 60 days after the filing of the notice of appeal in the district court, counsel for the appellant shall file, with

proof of service as prescribed by Rule 29, 40 printed copies of a statement as to jurisdiction and pay the docket fee prescribed by Rule 38. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14. The appendix must also include a copy of the notice of appeal showing the date it was filed in the district court. The jurisdictional statement and the appendices thereto must be produced in conformity with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner prescribed in Rule 39. A Justice of this Court may, for good cause shown, extend the time for filing a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement must set out the basis of jurisdiction in this Court, must identify the judgment to be reviewed, must include a copy of the opinion, any order respecting rehearing, and the notice of appeal, and must set forth specific reasons why the granting of an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

Supreme Court Rule 14.1 provides as follows:

> The petition for a writ of certiorari shall contain, in the order here indicated:
>
> (a) The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitiious. They must be set forth on the first page following the cover with no other information appearing on that page. The statement of any qeustion presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.
>
> (b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the names of all parties appear in the caption of the case. This listing may be done in a footnote. See also Rule 29.1 for the required listing of parent companies and nonwholly owned subsidiaries.
>
> (c) A table of contents and a table of authorities, if the petition exceeds five pages.
>
> (d) A reference to the official and unofficial reports of opinions delivered in the cases by other courts or administrative agencies.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the entry of the judgment or decree sought to be reviewed;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari;

(iii) Express reliance upon Rule 12.3 when a cross-petition for a writ of certiorari is filed under that Rule and the date of receipt of the petition for a writ of certiorari in connection with which the cross-petition is filed; and

(iv) The statutory provision believed to confer onthis Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subparagraph .1(k) of this Rule.

(g) A *concise* statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

(i) If review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

(k) An appendix containing, in the following order:

(i) The opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Any other opinions, orders, findings of fact, and conclusions of law rendered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry.

(iii) Any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry.

(iv) The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (1) of this subparagraph.

(v) Any other appended materials.

If what is required by subparagraphs .1(f), (6), and (k) of this Rule to be included in or filed with the petition is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

In pertinent part, Supreme Court Rule 39.1 provides that "[a] party desiring to proceed *in forma pauperis* shall file with the pleading a motion for leave to proceed *in forma pauperis*, together with the party's notarized affidavit or declaration (in compliance with 28 U.S.C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. See 28 U.S.C. § 1915."

STATEMENT

On September 20, 1991, pursuant to Missouri state law, a Final Apportionment Plan was filed with the Missouri Secretary of State by the Missouri House Apportionment Commission. The Plan reapportioned the Missouri House of Representatives, one of two branches of the legislature in this state. Shortly after the Plan was filed with the Secretary of State, two separate legal actions were filed, one in the Eastern District and one in the Western District of Missouri, attacking the validity of the Plan, primarily under § 2 of the Voting Rights Act, as amended in 1982, Title 42 U.S.C. § 1973. Shortly thereafter, the Eastern District case was transferred to the Western District, and these cases were consolidated in the trial court under the case number 91-0840-CV-W-2.

After a trial on all issues presented, and after extensive pre- and post-trial briefs and proposed findings, the three-judge

district court, convened in the United States District Court for the Western District of Missouri, filed its Opinion on July 15, 1992. Formal judgment on that opinion was entered by the clerk of the United States Court of Appeals for the Western District, also on July 15, 1992. (Appendix to Jurisdictional Statement, pp. 1, 41.) The Opinion and Judgment of the three-judge court upheld the validity of the Final Apportionment Plan and denied plaintiffs' requests for relief. No post-trial motions affecting the finality of the judgment were filed.

On September 4, 1992, some 51 days after the entry of judgment by the trial court, appellants filed their notice of appeal in the district court. (Appendix to Jurisdictional Statement, 42.)

Defendants Blunt and Ashcroft received a copy of one intervenor-defendant's motion to dismiss appeal, filed by intervenor-defendant Richard Dorsey, on November 9, 1992. The

motion was filed in this Court. Supreme Court Rule 18.5 and .6 provide no mechanism for a motion to dismiss appeal prior to the filing of a jurisdictional statement. The basis of Dorsey's motion was that appellants' notice of appeal was not filed within thirty days of the entry of the final district court judgment.

On November 2, 1992, appellees Blunt and Ashcroft received appellants' Application to File Documents on 8 1/2 x 11 Paper, Declaration in Support of Application In Forma Pauperis, and Jurisdictional Statement.[1]

There is no question but that Appellants' Jurisdictional Statement is not in compliance with the printing requirements of Rule 33. Appellants concede this point by making

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[1]The appellees do not presently know the precise day on which these documents were filed in this Court, but the documents clearly were filed no more than sixty days after the filing of the notice of appeal in the district court, as required by Supreme Court Rule 18.3.

application to file the Jurisdictional Statement on 8-1/2 by 11 paper *in forma pauperis*. The Jurisdictional Statement includes a section for questions presented for review,[2] a Table of Contents, a list of authorities, statutes, and regulations involved in the case, a statement of jurisdictional grounds,[3] a statement of the case, and an appendix, which includes the opinion of the district court, the formal judgment of the district court, and the notice of appeal. The jurisdictional statement does not include "[a]

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[2]Appellants posit ten separate questions presented for review, accounting for three and a half typewritten pages. The questions presented section is not short and concise. Several of the questions presented, especially I, V, IX, and X are argumentative. The questions presented were certainly repetitious and included unnecessary detail.

[3]The statement of appellants pertaining to the grounds on which the jurisdiction of this Court is invoked is not concise. It includes reference to facts and issues not referenced in Supreme Court Rule 14.1(e) and is extremely argumentative.

reference to the official and unofficial reports of opinions delivered in this case by other courts or administrative agencies" as required by Rule 14.1(d), a section containing "[t]he constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case . . ." as required by Rule 14.1-(f), an argument section, as required by Rule 14.1(j), or a formal conclusion.

With the jurisdictional statement, appellants filed a Declaration in Support of Application in Forma Pauperis. The Declaration is signed by the attorney for the appellants, Elbert A. Walton, Jr. The appellants have not filed a motion for leave to proceed *in forma pauperis*. The appellants have not filed the notarized affidavit or declaration, in compliance with 28 U.S.C. § 1746, of any party. The declaration filed by appellants is not in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. Furthermore, the declaration purports to

demonstrate that the African American Voting Rights Legal Defense Fund, Inc., an organization apparently formed for the limited and exclusive purpose of participating in this litigation, has spent the majority of donations received to date. However, the declaration does not demonstrate that the individual plaintiffs, or counsel for the plaintiffs, are without funds sufficient to comply with Rule 33 or to pay a filing fee.[4]

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[4]Although he is not formally a party, Mr. Walton is both an attorney and a Missouri state legislator, a prominent political and legal figure in the City of St. Louis and the State of Missouri, and does have a personal stake in the outcome of this litigation. Additionally, most of the other individual appellants, and the intervenor plaintiffs, are prominent Missouri citizens, many, like Mr. Walton, holding important legal office. There is no reason to believe that these individuals could not, collectively or individually, pay for the printing of a jurisdictional statement or defray the cost of the filing fee.

ARGUMENT

I.

THIS COURT MAY LACK JURISDICTION OVER THIS APPEAL BECAUSE APPELLANTS FAILED TO FILE A TIMELY NOTICE OF APPEAL.

Before appellants' jurisdictional statement was filed, Richard Dorsey, an intervenor-defendant in the trial court, filed a motion to dismiss appeal. Supreme Court Rule 18 does not provide for a motion to dismiss prior to a jurisdictional statement; therefore, Mr. Dorsey's motion may be a nullity. In his motion, the intervenor argued that appellants' notice of appeal was out of time pursuant to Supreme Court Rule 18.1, which states that "[a] direct appeal from a decision of the United States District Court, when authorized by law, is commenced by filing a Notice of Appeal with the Clerk of the District Court within 30 days after the entry of judgment sought to be reviewed. The time may not be extended . . . ."

In their jurisdictional statement, appellants invoke Title 28 U.S.C. § 21.01(b) which provides that "[a]ny other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days if final." The appellees concede that the July 15, 1992, judgment of the United States District for the Western District of Missouri was a final, as opposed to an interlocutory, judgment for purposes of appeal.

The appellants filed their notice of appeal in the district court more than thirty but less than sixty days after entry of a final judgment. There is a conflict between the provisions of Rule 18.1 and 28 U.S.C. § 21.01(b). It is logical that the thirty-day time limitation for filing a notice of appeal should apply. A petitioner for a writ of

certiorari must file within ninety days after the entry of a final judgment. If an appellant files a notice of appeal within thirty days after the entry of a final judgment, Rule 18.1, and a jurisdictional statement sixty days after the filing of a notice of appeal, Rule 18.3, the jurisdictional statement will be filed within ninety days after the entry of a final judgment in the district court. Petitions for certiorari and jurisdictional statements are analogous documents. There is no logical reason why both petitioners and appellants should not have to file these documents within the same time frame. If the position of appellants, relying upon 28 U.S.C. § 21.01(b), is valid, then appellant has 120 days in which to file a jurisdictional statement, whereas a petitioner has only ninety days to file for certiorari. To resolve this apparent conflict, the Court should dismiss this appeal because the notice was untimely.

II.

BECAUSE APPELLANTS HAVE FAILED TO COMPLY WITH THE PROVISIONS OF RULE 18.3, RESPECTING THE CONTENTS OF THEIR JURISDICTIONAL STATEMENT, THIS APPEAL SHOULD BE DISMISSED.

In pertinent part, Supreme Court Rule 18.3 provides that "[t]he jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14." Among other requirements as to content, Rule 14.1 requires the inclusion of "[a] reference to the official and unofficial reports of opinions delivered in the case by other courts or administrative agencies," a section setting forth "[t]he constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case . . . ," and an argument amplifying why the questions presented are substantial. Rule 14.1 also requires that the questions presented for review should be short and concise and neither

argumentative nor repetitious. The rule also requires a "concise" statement of jurisdictional grounds. With respect to each and every one of these specific requirements, appellants' jurisdictional statement is deficient. Therefore, this appeal has not been taken in conformity with the Rules of this Court.[5]

III.

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE *IN FORMA PAUPERIS* PAPERS FILED BY APPELLANTS DO NOT COMPLY WITH RULE 39.

As relevant to this motion, Supreme Court Rule 39.1 provides:

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[5]Former Supreme Court Rule 16.1(a) provided that a motion to dismiss lies if an appeal is "not taken in conformity with statute or with these rules." Present Rule 18 is less specific with respect to when a motion to dismiss an appeal is applicable. However, Rule 18.6 does allow an appellee "to defend a judgment on any ground that the law and record permit . . . ."

> A party desiring to proceed *in forma pauperis* shall file with the pleading a motion for leave to proceed *in forma pauperis*, together with the party's notarized affidavit or declaration (in compliance with 28 U.S.C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. See 28 U.S.C. § 1915.
>
> * * *
>
> The motion shall also state whether or not leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted.

The appellants have not filed "a motion for leave to proceed *in forma pauperis*." The appellants have filed a "Declaration in Support of Application for In Forma Pauperis," signed by Elbert A. Walton, Jr., the attorney for appellants. Mr. Walton is not a party to these proceedings. No notarized affidavit or declaration has been filed on behalf of a party. The declaration references the present financial condition of the African American Voting Rights Legal Defense Fund, Inc., an appellant and an organization apparently

created for the sole purpose of participating in this litigation. Five individual appellants are named on the caption of the declaration. Notarized affidavits or declarations from these individual appellants have not been filed. Although the attorney for appellants is not a party, Mr. Walton is a Missouri state legislator and has a substantial stake in the outcome of these proceedings. He does not suggest, by affidavit, declaration, or otherwise, that he is unable to afford the cost of printing, as required by Rule 33, or that he and the other individual plaintiffs are unable to pay a filing fee. Nothing filed by appellants states whether leave to proceed *in forma pauperis* was sought or granted in the district court. The declaration that appellants did file does not comply with the Rules of Appellate Procedure, Form 4, as required by Rule 39.1.

Although the papers filed by appellant do not comply with the Rules of this Court,

appellants have proceeded to violate the requirements of Rule 33, which relates to the nature of printing of a jurisdictional statement and the form for such document.

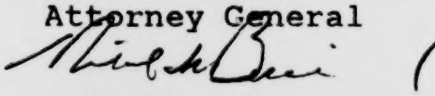
Because appellants have failed to comply with Supreme Court Rules 33 and 39, this appeal should be dismissed.

CONCLUSION

For the reasons stated in this Motion, this appeal should be dismissed.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General



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